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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION
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16 RUSSELL BRIMER,

17 Plaintiff

18 v.
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20 BERKELEY BOWL MARKETPLACE;
21 BERKELEY BOWL PRODUCE, INC.; and
DOES 1 through 150,

22 Defendants.
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ENDORSED
FILED
ALAMEDA COUNTY

SEP 26 2006

CLERK
By _____

M. Salcido

OR COURT
Deputy

RG06290900

No. _____

**COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE
RELIEF**

(Health & Safety Code §25249, et seq.)

1 RUSSELL BRIMER, by and through his counsel, on behalf of himself, on behalf all others
2 similarly situated and on behalf of the general public, hereby alleges as follows:

3 **NATURE OF THE ACTION**

4 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER,
5 on behalf of citizens of the State of California, to enforce each citizen's right to be informed of the
6 presence of and nature of toxic chemicals in consumer goods.

7 2. This Complaint seeks to remedy defendants' continuing failures to warn the citizens
8 of the State of California about the presence of, the nature of, and such citizens' actual and
9 potential exposure to lead present in or on consumer products placed into the stream of commerce
10 by defendants.

11 3. Lead is a chemical that is identified in Title 22, California Code of Regulations
12 ("CCR") §12000 and that is known to the State of California to cause birth defects and other
13 reproductive harm. Lead shall hereafter be referred to as the "LISTED CHEMICAL".

14 4. The consumer products containing the LISTED CHEMICAL, and for which
15 defendants are responsible, are glassware intended for the consumption of food or beverages with
16 colored artwork or designs on the exterior including, but not limited to, *Bonny Doon Muscat Vin de*
17 *Glaciere* (#7 69434 10606 0). All such consumer products containing the LISTED CHEMICAL
18 shall hereafter be referred to as the "PRODUCTS".

19 5. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986,
20 Health & Safety Code §25249.5 *et seq.*¹ (hereafter "Proposition 65"), "No person in the course of
21 doing business shall knowingly and intentionally expose any individual to a chemical known to the
22 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
23 such individual...."

24 6. On February 27, 1987, the State listed lead as a chemical known to cause birth
25 defects and other reproductive harm. This chemical became subject to the warning requirement
26 one year later and was therefore subject to the "clear and reasonable warning" requirements of
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¹ Unless specifically noted, all statutory citations refer to California law.

1 Proposition 65, beginning on February 27, 1988. (22 CCR §12000(c); Proposition 65)

2 7. Defendants' failures to provide proper mandatory warnings about exposure to the
3 LISTED CHEMICAL in conjunction with the sale of the PRODUCTS is a violation of Proposition
4 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such
5 violation.

6 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
7 and permanent injunctive relief to compel defendants to provide purchasers of the PRODUCTS
8 with the appropriate Proposition 65 warning regarding the health hazards of the LISTED
9 CHEMICAL.

10 9. Plaintiff also seeks civil penalties against defendants for their violations of
11 Proposition 65, as provided for by Health & Safety Code §25249.7(b).

12 **PARTIES**

13 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated
14 to protecting the health of California citizens, including the elimination or reduction of toxic
15 exposures from consumer products, and who brings this action on behalf of the general public
16 pursuant to Health & Safety Code §25249.7.

17 11. Defendant BERKELEY BOWL MARKETPLACE ("MARKETPLACE") is a
18 person doing business within the meaning of Health & Safety Code §25249.11.

19 12. MARKETPLACE distributes and/or offers the PRODUCTS for sale or use in the
20 State of California or implies by its conduct that it distributes and/or offers the PRODUCTS for
21 sale or use in the State of California.

22 13. Defendant BERKELEY BOWL PRODUCE, INC. ("PRODUCE") is a person doing
23 business within the meaning of Health & Safety Code §25249.11.

24 14. PRODUCE distributes and/or offers the PRODUCTS for sale or use in the State of
25 California or implies by its conduct that it distributes and/or offers the PRODUCTS for sale or use
26 in the State of California.

15. Defendants DOES 1-50 (hereafter “MANUFACTURER DEFENDANTS”) are each persons doing business within the meaning of Health & Safety Code §25249.11.

16. MANUFACTURER DEFENDANTS engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, one or more of the PRODUCTS for sale, consumption or use in the State of California.

17. Defendants DOES 51-100 (hereafter “DISTRIBUTOR DEFENDANTS”) are each persons doing business within the meaning of Health & Safety Code §25249.11.

18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or transport one or more of the PRODUCTS to individuals, businesses or retailers in the State of California.

19. Defendants DOES 101-150 (hereafter “RETAIL DEFENDANTS”) are each persons doing business within the meaning of Health & Safety Code §25249.11.

20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.

21. At this time, the true names of Defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil Procedure §474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences herein alleged. When ascertained, their true names shall be reflected in an amended complaint.

22. MARKETPLACE, PRODUCE, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS, where appropriate, collectively be referred to hereafter as “DEFENDANTS”.

VENUE AND JURISDICTION

23. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil Procedure §§394, 395, 395.5 because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continues to occur, in the County of Alameda and/or because DEFENDANTS conducted, and continue to conduct, business in this County with

1 respect to the PRODUCTS.

2 24. The California Superior Court has jurisdiction over this action pursuant to
3 California Constitution Article VI, §10, which grants the Superior Court “original jurisdiction in all
4 causes except those given by statute to other trial courts.” The statute under which this action is
5 brought does not specify any other basis of subject matter jurisdiction.

6 25. The California Superior Court has jurisdiction over DEFENDANTS based on
7 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
8 association that either is a citizen of the State of California, has sufficient minimum contacts in the
9 State of California, or otherwise purposefully avails itself of the California market.
10 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
11 courts consistent with traditional notions of fair play and substantial justice.

12 **FIRST CAUSE OF ACTION**

13 **(Violation of Proposition 65)**

14 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
15 Paragraphs 1 through 25, inclusive.

16 27. The citizens of the State of California have expressly stated in the Safe Drinking
17 Water and Toxic Enforcement Act of 1986, Health & Safety Code §25249.5, *et seq.* (“Proposition
18 65”) that they must be informed “about exposures to chemicals that cause cancer, birth defects and
19 other reproductive harm.” (Proposition 65, §1(b).)

20 28. Proposition 65 further states that, “No person in the course of doing business shall
21 knowingly and intentionally expose any individual to a chemical known to the state to cause cancer
22 or reproductive toxicity without first giving clear and reasonable warning to such individual....”

23 29. Based on information and good faith belief, plaintiff alleges that, at all times
24 relevant to this Complaint, DEFENDANTS have engaged in the sales of the PRODUCTS in
25 violation of Health & Safety Code §25249.6, *et seq.*, and that DEFENDANTS’ offensive sale of
26 the PRODUCTS has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day
27 Notice of Violation. Plaintiff also alleges and believes that such violations will continue to occur
28 into the future.

1 30. On November 23, 2005, a "60-Day Notice" of Proposition 65 violations, containing
2 a Certificate of Merit pursuant to California Health & Safety Code §25249.7(d)(1), was provided to
3 public enforcement agencies and to BERKELEY BOWL MARKETPLACE and BERKELEY
4 BOWL PRODUCE, INC. stating that exposures to the LISTED CHEMICAL were occurring in the
5 State of California from the reasonably foreseeable uses of the PRODUCTS, without the individual
6 purchasers and users first having been provided with a "clear and reasonable warning" regarding
7 such exposure.

8 31. The appropriate public enforcement agencies have failed to commence and
9 diligently prosecute a cause of action, under Health & Safety Code §25249.6, *et seq.*, against
10 DEFENDANTS based on the claims asserted in Plaintiff's 60-Day Notice.

11 32. At all times relevant to this action, the PRODUCTS contained the LISTED
12 CHEMICAL.

13 33. At all times relevant to this action, the DEFENDANTS knew or should have known
14 that the PRODUCTS contained the LISTED CHEMICAL.

15 34. At all times relevant to this action, the LISTED CHEMICAL was present in or on
16 the PRODUCTS in such a way as to be available for transfer or release from PRODUCTS to
17 individuals during the reasonably foreseeable use of the PRODUCTS.

18 35. The normal and reasonably foreseeable use of the PRODUCTS has caused and
19 continues to cause an exposure to the LISTED CHEMICAL, as such exposure is defined by
20 22 CCR §12601.

21 36. Based on information and good faith belief, plaintiff alleges that at all times relevant
22 to this action, DEFENDANTS had knowledge that individuals' normal and reasonably foreseeable
23 use of the PRODUCTS would cause an exposure to the LISTED CHEMICAL.

24 37. At all times relevant to this action, DEFENDANTS, and each of them, intended that
25 such exposures to the LISTED CHEMICAL from the reasonably foreseeable use of the
26 PRODUCTS would occur by their deliberate, non-accidental participation in the manufacture,
27 distribution and/or sale of PRODUCTS to individuals in the State of California.
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1 38. At all times relevant to this action, DEFENDANTS failed to provide a “clear and
2 reasonable warning” of reproductive toxicity (as defined by 22 CCR §12601) to those consumers or
3 other individuals in the State of California who were or could become exposed to the PRODUCTS
4 and the LISTED CHEMICAL contained therein.

5 39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
6 directly by California voters, individuals thus exposed to the LISTED CHEMICAL from the
7 PRODUCTS, without “clear and reasonable warning”, have suffered and continue to suffer
8 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

9 40. As a consequence of the above-described acts, DEFENDANTS, and each of them,
10 are liable, pursuant to Health & Safety Code §25249.7(b), for a maximum civil penalty of \$2,500
11 per day for each violation.

12 41. As a consequence of the above-described acts, Health & Safety Code §25249.7 also
13 specifically authorizes the grant of injunctive relief under Proposition 65 against DEFENDANTS.

14 Wherefore, plaintiff prays judgment against DEFENDANTS, and each of them, as
15 set forth hereafter.

16 **PRAYER FOR RELIEF**

17 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

18 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil penalties
19 against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation
20 alleged herein;

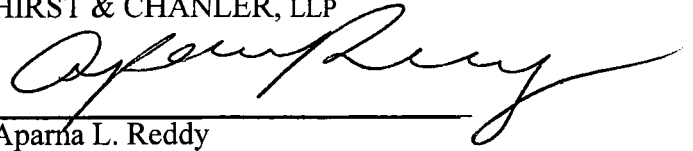
21 2. That the Court, pursuant to Health & Safety Code §25249.7(a), preliminarily and
22 permanently enjoin DEFENDANTS, and each of them, from offering the PRODUCTS for sale or
23 use in California, without providing an identification of the LISTED CHEMICAL in the
24 PRODUCTS as well as “clear and reasonable warning[s]” as defined by 22 CCR §12601, as
25 plaintiff shall specify in further application to the Court;

26 3. That the Court grant plaintiff his reasonable attorney’s fees and costs of suit; and

27 4. That the Court grant such other and further relief as may be just and proper.
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2 Dated: September 26, 2006

3 Respectfully Submitted,
4 HIRST & CHANLER, LLP

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6 Aparna L. Reddy
7 Attorneys for Plaintiff
8 RUSSELL BRIMER
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